

# State of South Dakota

## EIGHTIETH LEGISLATIVE ASSEMBLY, 2005

400L0256

### SENATE COMMERCE COMMITTEE ENGROSSED NO. **SB 13** - 01/14/2005

Introduced by: The Committee on Commerce at the request of the Department of Labor

1 FOR AN ACT ENTITLED, An Act to create certain provisions regarding transfers of  
2 experience rating accounts and assignment of unemployment insurance tax rates.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 61-5-33 be amended to read as follows:

5 61-5-33. Any individual, group of individuals, or employing unit that acquires its  
6 organization, trade or business from an employer for whom an experience-rating account has  
7 been maintained by the Department of Labor, shall immediately notify the department and upon  
8 the mutual consent of the parties concerned and approval of the department, may assume the  
9 position of the employer with respect to the experience-rating account. ~~However, transfer of the~~  
10 ~~experience-rating account from the predecessor to the successor employer shall be mandatory~~  
11 ~~if the ownership of both entities is substantially the same.~~ If the experience-rating account is not  
12 assumed by the successor employer or employing unit, the initial contribution rate for employers  
13 pursuant to § 61-5-20.2 shall be assigned to the successor employer or employing unit. The  
14 department shall promulgate rules pursuant to chapter 1-26 to carry out the provisions of this  
15 section consistent with federal standards of additional credit allowance as provided in section



1 3303 of the Internal Revenue Code.

2 Section 2. That chapter 61-5 be amended by adding thereto a NEW SECTION to read as  
3 follows:

4 Notwithstanding any other provision of law, the following provisions apply with regard to  
5 assignment of rates and transfers of experience:

6 (1) If an employer transfers its organization, trade, or business, or a portion thereof, to  
7 another employer and, at the time of the transfer, there is substantially common  
8 ownership, management, or control of the two employers, then the unemployment  
9 experience attributable to the transferred organization, trade, or business shall be  
10 transferred to the employer to whom the business is so transferred. The rates of both  
11 employers shall be recalculated and made effective immediately upon the date of the  
12 transfer of the organization, trade, or business; and

13 (2) If a person who is not an employer under this Title at the time the person acquires the  
14 organization, trade, or business of an employer, the unemployment experience of the  
15 acquired business may not be transferred to the person if the secretary finds that the  
16 person acquired the business solely or primarily for the purpose of obtaining a lower  
17 rate of contributions. Instead, the person shall be assigned the applicable new  
18 employer rate under the provisions of § 61-5-20.2. In determining whether the  
19 business was acquired solely or primarily for the purpose of obtaining a lower rate  
20 of contributions, the secretary shall use objective factors which may include the cost  
21 of acquiring the business, whether the person continued the business enterprise of the  
22 acquired business, how long the business enterprise was continued, or whether a  
23 substantial number of new employees were hired for performance of duties unrelated  
24 to the business activity conducted prior to acquisition.

Section 3. That chapter 61-5 be amended by adding thereto a NEW SECTION to read as follows:

If a person knowingly violates or attempts to violate provisions of section 2 of this Act related to determining the assignment of a contribution rate, or if a person knowingly advises another person in a way that results in a violation of such provision, the person is guilty of a Class 1 misdemeanor. In addition, the person is subject to the following penalties:

- (1) If the person is an employer, the employer shall be assigned the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following this rate year. However, if the person's business is already at the highest rate for any year, or if the amount of increase in the person's rate would be less than two percent for the year, then a penalty rate of contributions of two percent of taxable wages shall be imposed for such year; or
- (2) If the person is not an employer, the person is subject to a civil penalty of not more than five thousand dollars. Any such fine shall be deposited in the penalty and interest account established under § 61-3-28.

For purposes of this section, the term, knowingly, means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

Section 4. That chapter 61-5 be amended by adding thereto a NEW SECTION to read as follows:

The secretary shall promulgate rules pursuant to chapter 1-26 to establish procedures to identify the transfer or acquisition of a business for purposes of section 2 of this Act and to implement the application of section 2 of this Act.

Section 5. That chapter 61-5 be amended by adding thereto a NEW SECTION to read as

1 follows:

2 Terms used in sections 2 to 4, inclusive, mean:

3 (1) "Person," person as defined by section 7701(a)(1) of the Internal Revenue Code of  
4 1986; and

5 (2) "Trade or business," includes the employer's workforce.

6 Section 6. That chapter 61-5 be amended by adding thereto a NEW SECTION to read as  
7 follows:

8 The provisions of sections 2 to 6, inclusive, of this Act shall be interpreted and applied in  
9 such a manner as to meet the minimum requirements contained in any guidance or regulations  
10 issued by the United States Department of Labor.

11 Section 7. That § 61-5-33.1 be amended to read as follows:

12 61-5-33.1. The Department of Labor may waive the mandatory transfer of the  
13 experience-rating account required by ~~§ 61-5-33~~ section 2 of this Act if the inherent nature of  
14 the employing unit has substantially and permanently changed since July 1, 1988. The  
15 provisions of this section apply to account transfers occurring on or after July 1, 1992.

16 Section 8. That chapter 61-5 be amended by adding thereto a NEW SECTION to read as  
17 follows:

18 The secretary shall establish procedures to identify the transfer or acquisition of a business  
19 for purposes of this Act.